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Issue Date: 10 September 2004

In the matter of
Larry L. Shannon
Claimant

v.

2002-LHC-00429
BRB No. 03-0259

IMC Agrico MP Inc.
Employer

and

Travelers Insurance Company
Carrier

ORDER

DECISION AND ORDER ON REMAND

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901, et seq., (the "Act"), and the regulations promulgated thereunder. The Claimant is represented by Anthony V. Cortese, Esquire, of Tampa, Florida. The Employer/Carrier is represented by William C. Cruse, Blue Williams, L.L.P., of Metarie, Louisiana. After a hearing in Tampa, Florida, I entered a Decision and Order awarding certain medical treatment and denying certain other requested medical treatment.

Although I determined in my Decision and Order that the work injury caused both physical and mental injuries, I determined that it did not cause Claimant's contemporary problems with ambulation and mobility; that Claimant's ambulation problems were caused by his pre-existing peripheral vascular disease and pulmonary condition and not by the back, neck or psychological injuries caused by the work injury. Decision and Order at 24. After considering the entire "Rothman Report", which outlined a list of medical and occupational recommendations, I awarded medical benefits for family and marital counseling, an abdominal brace, and a back brace, but denied the remaining recommended items, concluding they were to alleviate claimant's mobility problems or were not necessary or reasonable for the treatment of his work-related injuries. Decision and Order at 27-32.

My Decision was appealed by the Claimant. In a Decision and Order dated Nov. 25, 2003, my Decision and Order was affirmed in part and remanded in part by the Benefits Review Board ("Board" or "BRB"). The Board ruled that Claimant had established a number of "harms" and an accident that could have caused them, so that the Section 20(a) presumption should have been invoked as to aggravation.[1]

Section 20(a) Presumption

Section 20 of the Act provides:

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[1] *Citing* to ***Kelaita v. Triple A Machine Shop***, 13 BRBS 326 (1981); *see also* ***U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP***, 455 U.S. 608, 14 BRBS 631 (1982).

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary--
>
> (a)That the claim comes within the provisions of this Act.
>
> (b)That sufficient notice of such claim has been given.
>
> (c)That the injury was not occasioned solely by the intoxication of the injured employee.
>
> (d)That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

33 U.S.C. § 920.

Upon invocation of the Section 20(a) presumption, the burden shifts to the employer to rebut the presumption with substantial evidence demonstrating that the claimant's condition was not caused or aggravated by his employment. ***Brown v. Jacksonville Shipyards, Inc***., 893 F.2d 294, 23 BRBS 22(CRT) (11 th Cir. 1990); ***O'Kelley v. Dep't of the Army/NAF***, 34 BRBS 39 (2000), *petition for review denied*, No. 02-12758 (11 th Cir. Feb. 5, 2003). Where aggravation of a pre-existing condition is at issue, the employer must establish that the work events neither directly caused the injury nor aggravated the pre-existing condition, resulting in the injury. ***O'Kelley***, 34 BRBS at 41; *see also* ***Cairns v. Matson Terminals***, 21 BRBS 262 (1988). The employer need not establish proof of another agency of causation to rebut the presumption; a medical opinion given to a reasonable degree of medical certainty that no relationship exists between the injury and the employment is sufficient to rebut the Section 20(a) presumption. ***O'Kelley***, 34 BRBS at 41. Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. ***Strachan Shipping Co. v. Nash***, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc); ***Kubin v. Pro-Football, Inc.***, 29 BRBS 117 (1995). If the employer rebuts the presumption, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. ***Universal Maritime Corp. v. Moore***, 126 F.3d 256, 31 BRBS 119(CRT) (4 th Cir. 1997); see also ***Director, OWCP v. Greenwich Collieries***, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Mandate

The Board concluded that the real dispute concerns whether claimant's ambulation and mobility problems are related to his work injuries.

> To sever the causal relationship, employer presented evidence to show that the pain in claimant's legs is claudication and is the result of his pre-existing peripheral vascular disease. Emp. Exs. 1 at 22-23, 26; 2 at 14, 20-21, 45. Dr. Nagamia, claimant's cardiovascular surgeon, testified that claimant has chronic obstruction of his iliac arteries from years of plaque build-up and that there is no evidence to show that claimant's condition arose from an acute onset following the work accident. The blockage causes claudication, pain when walking, and if it becomes severe enough, advances to pain at rest. Emp. Ex. 2 at 5, 14, 20-21, 45. Dr. Eichberg, employer's expert on physical medicine and rehabilitation, testified that there is no neuromuscular reason for claimant to have pain while ambulating and that the problem is primarily due to claimant's cardiovascular and pulmonary problems. Given claimant's history of episodes of low blood pressure, Dr. Eichberg opined that the pain could be secondarily related to a condition called orthostatic hypotension. He concluded that the pain related to ambulation is vascular and is not related to the work accident. Emp. Ex. 1 at 4, 22-23, 26, 31. These opinions are sufficient to rebut the Section 20(a) presumption with regard to a direct

causal connection between claimant's injury and his ambulatory problems. ***Rochester v. George Washington University***, 30 BRBS 233 (1997).

Thereafter, I credited the opinions of Drs. Eichberg and Nagamia and found that claimant's problems with ambulation and mobility were caused by his pre-existing cardiovascular and pulmonary conditions. Decision and Order at 24.

> In light of his thorough recitation of the record and his detailed reasons for giving greater weight to the opinions of these doctors over the opinions of others, we affirm the administrative law judge's determination that claimant's problems with ambulation and mobility were not directly caused by his work accident. Thus, his error in failing to discuss Section 20(a) in this regard was harmless.[2]

The Board noted, however, that where aggravation has been raised, the Section 20(a) presumption also applies to relate the injury to the work accident. Thus, application of Section 20(a) presumes that the work injury aggravated the pre-existing condition, and the presumption must be rebutted specifically. ***Hensley v. Washington Metropolitan Area Transit Authority***, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), cert. denied, 456 U.S. 904 (1982).

> In this case, Claimant contends the work injury and the sequela thereof aggravated, accelerated, exacerbated, contributed to or combined with his pre-existing conditions and resulted in his ambulation and mobility problems. The administrative law judge did not address aggravation and, indeed, stated only "[i]t is interesting that the Claimant did not develop whether his ambulation problems were pre-existing, or were aggravated or exacerbated by the compensable injury." Decision and Order at 24. Contrary to the administrative law judge's statement, and employer's arguments on appeal, claimant raised the issue of aggravation at the hearing and in his Final Amended Memorandum in Support of Claimant's Contentions for Final Hearing (claimant's post-hearing brief). At the hearing, claimant's counsel stated that claimant's cardiovascular condition, including both the conditions in his heart and in his legs, was aggravated by claimant's inability to exercise after the work injury and also to the stress and anxiety claimant suffered following the work injury. Tr. at 29-30. In his post-hearing brief, claimant asserted that lack of exercise and stress accelerated the accumulation of plaque in claimant's arteries and aggravated his vascular disease. Claimant asserted his cardiac condition was aggravated for the same reasons. Cl. Post-Hearing Brief at 9-10. Claimant also raised the possibility that the work-related musculoskeletal conditions aggravated, accelerated or combined with his pre-existing conditions to limit his mobility. Id. at 11.

To support his assertions, claimant directed the Board's attention to the opinion of Dr. Nagamia, that claimant's inability to exercise after the work injury could have contributed to an accumulation of plaque in his leg arteries. Further, Dr. Nagamia also stated that claimant's stress could play a role in contributing to the development of plaque, as could his anxiety, panic attacks, and severe depression. 5 Emp. Ex. 2 at 75-76. Dr. Eichberg stated that, while he would normally encourage a patient to exercise to improve the health of his legs, he would not encourage exercise in this case because claimant has too many other things wrong with him. Emp. Ex. 1 at 33. Claimant and his wife testified as to the stress they have felt since this injury and to the decline in claimant's level of activity since the accident. Tr. at 47-50, 55-60, 86-88, 101-103, 106-107.

The administrative law judge specifically credited claimant and his wife as to the stress

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[2] *Citing* to ***O'Berry v. Jacksonville Shipyard***s, Inc., 21 BRBS 355 (1988), *aff'd and modified* on other grounds on recon., 22 BRBS 430 (1989); ***Cairns v. Matson Terminals, Inc***., 21 BRBS 252 (1988).

they have been under since the accident as a result of claimant's failing health, Decision and Order at 18, and there is no contradictory evidence regarding claimant's decline in activity. If credited, Dr. Nagamia's testimony could support a finding that claimant's work injury, and its sequela, aggravated or exacerbated claimant's pre-existing vascular condition, resulting in his ambulation problems. As the administrative law judge did not discuss aggravation, we must vacate his determination that claimant's ambulation and mobility problems are not work-related, and we remand the case to the administrative law judge for further consideration of this issue consistent with Section 20(a).[3]

Claimant next contended he is entitled to medical benefits as recommended in the Rothman report. Section 7 of the Act, 33 U.S.C. 907, authorizes coverage of medical expenses for the reasonable and necessary treatment of a claimant's work-related injury. The claimant has the burden of establishing the elements of a claim for medical benefits. ***Schoen v. United States Chamber of Commerce***, 30 BRBS 112 (1996). I denied many of the recommendations made in the Rothman report because I found they pertained to claimant's ambulation and mobility problems.

In light of our decision to vacate the administrative law judge's finding that claimant's ambulation problems are not related to his work injury and to remand the case for consideration of whether the work injury aggravated a pre-existing condition, resulting in the ambulation problems, we must also vacate his denial of the medical recommendations made in the Rothman report that he found were related to the ambulation problems. This would include, among other things, the need for the motorized wheelchair and related accessories and architectural renovations, as well as the need for a walker, and home care. On remand, if the administrative law judge determines that claimant's vascular condition was not aggravated by the work injuries, then his reasons for rejecting the mobility-related treatments are rational, and claimant is not entitled to those items under the Act. If, however, the administrative law judge finds that the work injury and/or its sequela aggravated, accelerated or contributed to claimant's current ambulation problems, then the administrative law judge must reconsider the need for each requested item that he denied solely because it related to claimant's ambulation problems.[4]

Other Issues in the Board's Decision

Although I did not invoke the Section 20(a) presumption or discuss rebuttal, the Board found the error was harmless with regard to the causal connection between Claimant's employment and his back, neck and psychological injuries.

Substantial evidence supports the administrative law judge's conclusion that those injuries are work-related, and no party challenges the findings. Decision and Order at 25-27. Thus, in addition to the treatment claimant has been receiving from his doctors for these respective injuries, the administrative law judge also rationally awarded the back brace, abdominal brace, and the family and marital counseling recommended in the

[3] *Citing* to ***Seguro v. Universal Maritime Service Corp***., 36 BRBS 28 (2002); see, e.g., ***Morehead Marine Services, Inc. v. Washnock***, 135 F.3d 366, 32 BRBS 8(CRT) (6 th Cir. 1998); ***Casey v. Georgetown University Medical Center***, 31 BRBS 147 (1997); ***Leone v. Sealand Terminal Corp.***, 19 BRBS 100 (1986).

[4] *Citing* to ***Weber v. Seattle Crescent Container Corp***., 19 BRBS 146 (1986).

Rothman report. *Id*. at 31. Those findings are, therefore, affirmed.[5]

Claimant also contended that I erred in denying the use of a physiatrist to coordinate claimant's medications and treatments. I denied this request because he concluded claimant failed to offer a medical opinion addressing the need for such a specialist. Decision and Order at 30. Claimant contends Ms. Rothman's recommendation received blanket endorsement from Drs. DeVine and Martinez and that Dr. Eichberg also supported the services of a physiatrist.

> Contrary to claimant's assertion, the evidence he cites does not warrant interfering with the administrative law judge's finding on this matter. First, it is clear the administrative law judge did not give great weight to the doctors who gave blanket endorsements to these recommendations. Decision and Order at 28-29. This is reasonable because, for example, when asked to address the need for specific items, Dr. Martinez, at least, stated that certain of those items were not "necessary." Cl. Ex. 3. Further, although Dr. Eichberg agreed that claimant would benefit from the services of a physiatrist, he noted that claimant had managed for three years without one. Emp. Ex. 1 at 35. As claimant bears the burden of establishing that medical expenses are reasonable and necessary, we affirm the administrative law judge's determination that he has not done so with regard to the need for the services of a physiatrist.[6]

Activity Post Appeal

Over Employer/Carrier's objections, in the event that I find evidence of aggravation pursuant to Mandate, Claimant effectively withdrew demands for architectural renovations, building of a new driveway and for an electric bed.[7]

Discussion Re: Aggravation

Based on the Board's mandate, I accept that the Claimant has made a *prima facie* showing under Section 20(a) of the Act and that the burden shifts to the Employer/Carrier. ***Brown v. Jacksonville Shipyards, Inc***., 893 *supra*; ***O'Kelley v. Dep't of the Army/NAF***, *supra*. Where aggravation of a pre-existing condition is at issue, the employer must establish that the work events neither directly caused the injury nor aggravated the pre-existing condition, resulting in the injury. The employer need not establish proof of another agency of causation to rebut the presumption; a medical opinion given to a reasonable degree of medical certainty that no relationship exists between the injury and the employment is sufficient to rebut the Section 20(a) presumption.

Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. ***Strachan Shipping Co. v. Nash***, *supra*; ***Kubin v. Pro-Football, Inc***. *supra*.

I note that the Claimant testified that there was a time after the accident where his condition did not necessitate the use of a wheelchair (Tr. 74). However, Mr. Shannon related that "I've gradually gotten worse and worse with the problem in the right leg and lower back having worsened the most" (Tr. 74-75). When questioned about whether he would need assistance, i.e. a wheelchair or cane, if the pain/problems in his right leg went away, Claimant

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[5] *Citing* to ***Bass v. Broadway Maintenance***, 28 BRBS 11 (1994); ***Clophus v. Amoco Production Co***., 21 BRBS 261 (1988).

[6] *Citing* ***Hunt v. Newport News Shipbuilding & Dry Dock Co***., 28 BRBS 364 (1994), *aff'd mem*., 61 F.3d 900 (4 th Cir. 1995); ***Wheeler v. Interocean Stevedoring, Inc***., 21 BRBS 33 (1988).

[7] *See* my Order dated July 21, 2004.

responded "maybe, but don't know because its not only the pain, leg gives out for no reason" (Tr. 75). I credit this testimony.

The Claimant argues that the Employer/Carrier failed to meet the burden of proof to rebut the Section 20(a) presumption.[8]

The Employer/Carrier has not presented affirmative proof from a medical witness to state unequivocally that aggravation, acceleration or exacerbation of the underlying vascular problem is contraindicated.

Instead, the Employer/Carrier asks me to infer from the record that the totality of the evidence shows that there was no aggravation, acceleration or exacerbation of the pre-existing problem. After ascertaining and articulating the basic facts, it is my prerogative to draw reasonable inferences. ***Cardillo v. Liberty Mut. Ins. Co***., 330 U.S. 469 (1947).

A review of the Employer/Carrier's brief shows that despite the Order of Remand directing me to apply the Section 20(a) presumption, it continues to allege that the Claimant bears the burden of proof.

The Employer/Cattier argues that, although Claimant's orthopedic and psychological injuries were caused while he was acting within the course and scope of his employment, the evidence and testimony establishes that his ambulation problems are related ***entirely*** to his pre-existing and non-compensible pulmonary and vascular diseases. "These diseases are in no way related to the September 28, 1999 accident." It points to the hearing testimony of Mr. and Mrs. Shannon, their son, and Timothy Eustice (a co-worker of Mr. Shannon). This testimony fully establishes a pre-existing cardiac and vascular condition. According to the Employer/Carrier, the trial testimony is "virtually devoid of any medical testimony which might shed light as to the source of Claimant's ambulation problems, and whether they are related to his employment or his heart condition. Accordingly, the Court must review the medical evidence to determine whether his complaints are, in fact, related to his employment."

The Claimant has had severe heart disease since 1990, and has had difficulty with blocked arteries, requiring five (5) angioplasties. At the referral of Dr. Jacobson, Claimant was sent for an evaluation of peripheral vascular disease to be made by Husain Nagamia, M.D. (EX 4). During the February 27, 2002 visit, Dr. Nagamia reviewed Mr. Shannon's contemporary complaints, his past surgical and medical histories, and performed a physical examination. *Id*. Dr. Nagamia's diagnostic impression was that Claimant suffered from peripheral vascular disease, with suspected occlusion of the right iliac artery with distal reconstitution; status post-stenting for coronary artery disease; a history of myocardial infarctions; chronic obstructive pulmonary disease (on corticosteroid therapy); obesity; and past tobacco over-utilization. *Id*. Dr. Nagamia recommended that Mr. Shannon have an aortogram with run-off to determine the extent of his peripheral vascular disease in the lower extremity. *Id*. Following his evaluation of Claimant for vascular disease of the lower extremities on May 1, 2002, Dr. Nagamia concluded that Mr. Shannon has complete occlusion of his right iliac artery, along with a history of thoracic injury and Parkinsonism. *Id*. However, it was noted that Claimant wished to postpone surgery until after his court date at the end of May. *Id*.

In addition to the medical records, Dr. Nagamia offered deposition testimony on May 9, 2002 (EX 2). Therein, Dr. Nagamia testified that he had been treating Mr. Shannon in terms of his vascular problems which include peripheral vascular disease. *Id*. Dr. Nagamia described peripheral vascular disease as causing blockages in the arteries, the right iliac artery in the Claimant's instance. *Id*. Dr. Nagamia determined the Claimant has chronic blockage (plaque),

[8] *Citing* ***to Ingalls Shipbuilding v. Director*** No. 03-60934 (5th Cir. July 28, 2004).

which causes claudication or pain while walking or exercise. *Id*. Dr. Nagamia added that if the blockage continues to advance, a patient starts developing pain at rest, from which Claimant also suffers. *Id*. As for the accumulation of plaque and blockage, Dr. Nagamia named the following as Claimant's risk factors: tobacco use, obesity, genetic tendency with prior myocardial infarcation, high cholesterol diet, a lack of exercise and stress. *Id*. Moreover, Dr. Nagamia offered that a person who has prior blockage in their heart and arteries would typically have blockage in other arteries – as can be seen with Mr. Shannon who presented a history of heart attacks and blockage in the blood vessels to the heart. *Id*. Based on the foregoing and his February 27, 2002 evaluation of Claimant, Dr. Nagamia concluded that Mr. Shannon most likely had chronic obstruction of his right iliac artery which was causing the symptoms in his right lower extremity. *Id*. As a result, Dr. Nagamia recommended that Claimant undergo a bypass graft, which would allow blood to bypass the occlusion and improve the blood supply of the right leg. *Id*. According to Dr. Nagamia, a successful bypass graft, which is 90-95% likely, would relieve Mr. Shannon of his pain associated with claudication, as well as his rest pain, thereby enabling him to walk and function better. *Id*. However, Dr. Nagamia pointed out that such surgery would not improve Claimant's neurological symptoms. *Id*.

When asked about the relation between Claimant's leg condition and the work-related accident, Dr. Nagamia testified that trauma can aggravate a chronic obstructive condition of the arteries as long as the trauma is directly involving the arteries themselves. *Id*.

The Employer/Carrier asks me to accept that because Dr. Nagamia testified that the symptoms associated with acute claudication usually occur almost immediately after and acute claudication associated with trauma will occur only if the trauma occurs directly to the artery, I should infer that aggravation or exacerbation is precluded from the record. The record shows that neither party, Claimant nor Employer/Carrier, directly asked the physician the crucial question. Therefore, this point has not been established by the Employer/Carrier.

Moreover, I note that the Claimant's mental state is such that it also is related to the state of the body as a whole, as Drs. Devine and Delaney have confirmed. If the vascular condition has been aggravated, then the effect on mental state of the vascular condition has also become compensable.

Employer/Carrier also relies on the testimony of Dr. Robert Martinez, Claimant's choice of neurologist. Dr. Martinez treated Claimant for his work-related injuries from January 10, 2000 through July 11, 2000. (Martinez, pp. 4-5). Employer/Carrier alleges that Dr. Martinez was unable to relate Claimant's neurological problems to his current issues with walking, and did not impose any walking restrictions on Claimant during the entire course of his treatment. It is alleged that Dr. Martinez testified that if Claimant was going to have any problem with ambulation caused by the September 1999 accident, it would have surfaced by the time he treated him, particularly by July 11, 2000. (Martinez, p. 38). Claimant's son testified that the ambulatory problems did not start until more than one year after his work-related injury. Employer/Carrier argues that this is further indication that his walking problems were not the result of a sudden trauma sustained in the work-related injury, but rather, evolved over the course of several years. However, I find that Dr. Martinez did not consider the vascular or mental impairments when he made his conclusion, and is not competent to testify to the progression of vascular disease.

Dr. Eichberg examined Claimant at the request of the Employer on May 2, 2002. Dr. Eichberg related Claimant's problems with mobility and ambulation as "primarily one of cardiovascular and pulmonary capacity." (Eichberg, p. 23). I do not credit Dr. Eichberg's

opinion as to aggravation of a vascular problem.

Employer/Carrier also relies on Dr. Nagamia's testimony and attempts to refute that there was an aggravation by negative implication. Dr. Nagamia is Claimant's treating heart surgeon, and has been treating Claimant for his cardiovascular problems since February 2002. Employer/Carrier argues that Dr. Nagamia's testimony "beyond a doubt" shows that Claimant's ambulation problems are entirely related to his heart condition. It argues that only a sudden blockage, or an "acute" blockage can cause claudication. Dr. Nagamia did testify that the symptoms associated with acute claudication usually occur almost immediately after the injury – within hours or even minutes. The extremity will become numb, the toes turn blue, and the leg will feel "dead." (Nagamia, p. 17). The symptoms, if not taken care of immediately, will become much worse. (Nagamia, p. 26). Furthermore, acute claudication associated with trauma will occur only if the trauma occurs directly to the artery. (Nagamia, p. 84, L. 17-22). However, Dr. Nagamia did not rule out claudication to Mr. Shannon.

Employer/Carrier argues,

> …even assuming that Claimant's leg was swollen after the accident, there is no evidence relating his swollen leg to acute claudication. He did not begin to suffer pain until over one year after the accident, and there is no evidence of a sudden injury to his right iliac artery. Furthermore, Claimant has suffered from peripheral vascular disease for ten years, this condition often causes chronic claudication, and Claimant's physicians have previously corrected other arteries suffering from claudication, namely, a mirror blockage in Claimant's right leg.

I credit Dr. Nagamia's testimony that a blockage causes claudication, pain when walking, and if it becomes severe enough, advances to pain at rest. Ex. 2 at 5, 14, 20-21, 45. The Employer/Carrier must establish that the work did not aggravate the pre-existing condition, resulting in the injury. I find that the Employer/Carrier failed to establish that the injury did not aggravate the pre-existing condition. Employer/Carrier's allegation shows, despite the Board's application of the Section 20(a) presumption, its continued assertion that Claimant bears the burden to show otherwise. ***Hensley v. Washington Metropolitan Area Transit Authority***, *supra*. I do not accept that the record shows that aggravation has been ruled out by necessary implication, or by application of reasonable inferences from the lay and medical testimony. ***Cardillo v. Liberty Mut. Ins. Co,*** *supra*. After a review of all of the evidence, I find that the Employer/Carrier has not met the burden to rebut the Section 20(a) presumption, and to show that the claimant's ambulation problems were not aggravated by the accident

Therefore, I accept that the vascular problems were aggravated by the accident, and are compensable.

Medical Treatment

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a). In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. ***Pernell v. Capitol Hill Masonry***, 11 BRBS 532, 539 (1979).

Medical care must be appropriate for the injury. See 20 C.F.R. § 702.402. Therefore, a judge may reject payment for unnecessary treatment. ***Ballesteros v. Willamette Western Corp***.,

20 BRBS 184, 187 (1988); ***Turner v. Chesapeake & Potomac Tel. Co***., 16 BRBS 255 (1984); ***Scott v. C & C Lumber Co***., 9 BRBS 815 (1978). A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. ***Turner***, 16 BRBS at 257-58. A judge has no authority to deny a medical expense on the ground that a physician's expertise, customary fees, or result of treatment were not documented. *Id*. at 257. Employer is only liable, however, for the reasonable value of medical services. *See* 20 C.F.R. § 702.413; ***Bulone v. Universal Terminal & Stevedoring Corp***., 8 BRBS 515, 518 (1978); ***Potenza v. United Terminals, Inc***., 1 BRBS 150 (1974), *aff'd*, 524 F.2d 1136, 3 BRBS 51 (2d Cir. 1975).

On October 5, 2001, the Claimant underwent an Assessment Interview and History with Phyllis Rothman, RN, BS, CCM, CDMS, CLCP (CX 5). Mr. Shannon presented complaints of limited range of motion and continued pain in his neck and shoulder; pain in the mid-upper back region, on the right side under his shoulder blade; weakness and a burning sensation down his right leg; weak hands, with limited strength; panic attacks which are tearful at times; continued headaches; tremors in both hands; and difficulty sleeping at night. *Id*. Claimant's secondary problems include difficulty getting in and out of chairs, only able to walk short distances and suffers with incontinence in the mornings. *Id*. Ms. Rothman's report also includes a review of Mr. Shannon's past and present medical histories, his daily and social activities and habits and a review of his personal and family background. *Id*.

A claimant may establish a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. ***Turner***, 16 BRBS at 257-58.

I note that Ms. Rothman is not a physician, and her opinion cannot be used to establish a *prima facie* case, but where her opinion is based on that of a qualified physician, I attribute significant weight to her opinion. I am not bound to accept the opinion or theory of any particular medical examiner. I may rely upon personal observation and judgment to resolve conflicts in the medical evidence. I am not bound to accept the opinion of a physician if rational inferences cause a contrary conclusion. ***Todd Shipyards Corp. v. Donovan***, 300 F.2d 741 (5th Cir. 1962); ***Ennis v. O'Hearne***, 223 F.2d 755 (4th Cir. 1955). *See also* ***Perini Corp. v. Hyde***, 306 F. Supp. 1321, 1327 (D.R.I. 1969). I am not bound by the opinion of one doctor and may rely on the independent medical evaluator's opinion and evidence from the medical records over the opinion of the treating doctor. ***Duhagan v. Metropolitan Stevedore Co***., 31 BRBS 98 (1997).

Claimant requested that Employer/Carrier provide him with certain items listed in the Rothman report which includes:

A. ***Jazzy 1120 Power Chair ("Jazzy Scooter")***

Based on the acceptance that the vascular and pulmonary and psychiatric problems were aggravated, I now accept that the scooter is medically necessary, and credit the opinions and the prescription of Dr. DeVine, as substantiated by the opinions of Dr. Delaney, Dr. Kabaria and Dr. Eichberg, and Ms. Rothman, and the qualified opinion of Dr. Nagamia. I discount the opinion of Dr. Saunders. I note that Dr. Devine is a treating physician, and I note that although he is not a vascular surgeon, he has had an opportunity to review the patient records and examine the Claimant. When an injured employee seeks benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), a treating physician's opinion is entitled to "special" weight. ***Amos v. Director, Office of Workers' Compensation Programs***, 153 F.3d 1051 (9th Cir., 1998) ; *See also*, ***American Stevedoring Ltd. v. Marinelli***, 248 F.3d 54, (2nd Cir., 2001)**.** In ***Pietrunti v. Director, Office of Workers' Compensation Programs***, 119 F.3d 1035 (2nd Cir. 1997) an ALJ's

findings were reversed by the court because he failed to attribute "great" weight to the opinion of a treating physician.

On August 13, 2001, Dr. DeVine prescribed a Jazzy 1120 Power Chair for Mr. Shannon (CX 13). In his deposition, Dr. DeVine testified that the prescription for the Jazzy Scooter was both medically and psychiatrically necessary for the Claimant because it enables people who are debilitated in their mobility to become more mobile (CX 1). Dr. DeVine further testified that Mr. Shannon is in need of the scooter "for ambulation purposes – (currently) he can travel only very small distances without the use of this apparatus". *Id*. According to Dr. DeVine, Claimant is very limited in his activity – use of a cane – as a result of the pain. *Id*. This pain, according to Dr. DeVine, affects Mr. Shannon's psychiatric condition in that it affects his self-esteem adversely, which exacerbates both the anxiety and mood disorder. *Id*. Dr. DeVine further testified that Claimant's psychiatric conditions – panic disorder without agoraphobia and major depression, recurrent and moderate in its intensity – are causally related to his work injury. *Id*. When questioned about the recommendations made in the Rothman Report, Dr. DeVine stated that he agreed with all of the recommendations made by Ms. Rothman. *Id*.

During his second deposition, he addressed the recommendations made in the Rothman Report. Dr. DeVine testified that they are reasonable and necessary because of Claimant's psychiatric and physical problems. *Id*.

Dr. Delaney, also a psychiatrist found panic disorder, post-concussional syndrome, personality disorder and his opinion that Claimant cannot drive (EX 19).

Dr. Saunders disagreed, for the most part, with Dr. Delaney's diagnosis[9] (EX 19). Dr. Saunders, also a psychiatrist, testified that, from a mental/psychological standpoint, the Claimant does not need a jazzy scooter. *Id*.

Dr. Kabaria testified that he endorsed Dr. DeVine's prescription for the Jazzy Scooter because he had been treating the Claimant for his pain symptomatology and spine pathology. *Id*. Dr. Kabaria went on to testify that "whether it [the scooter] is actually related to the injury and the need of that, I've signed it with thought process that, yes, I've been treating for this symptomatology, another physician has already said that, and I go along with another physician's recommendation. I've not put forward any – when I signed the prescription, I did not put forward any thought process of causal relationship at that time ". *Id*. Dr. Kabaria later testified that Claimant's need for the scooter is causally related to his work injury as a result of the degenerative conditions in his leg and back (lumbar disc). *Id*. Lastly, Dr. Kabaria testified that he would defer to the Rothman Report for the equipment needed in Claimant's home. *Id*.

Dr. Eichberg agreed with the recommendation because it would assist the Claimant in ambulation and benefit his vascular and respiratory problems[10] (EX 1, CX 24). Therefore, Dr. Eichberg concluded that the necessity of the scooter is caused by vascular and pulmonary problems. *Id*.

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[9] Dr. Saunders disagreed with the Dr. Delaney's diagnosis of panic disorder, post-concussional syndrome, personality disorder and his opinion that Claimant cannot drive (EX 19). However, Dr. Saunders agreed with Dr. Delaney's opinion wherein he found pain syndrome, post-accident (Id.).

[10] Specifically, Dr. Eichberg stated that "[h]e [the Claimant] would get around better with a scooter. I rarely recommend the scooter in my practice because I believe in exercise and that's how I make a living, but this man's vascular and respiratory problems are such that I don't think – if you get his legs better, his coronaries are going to give out. And if his coronaries don't give out, some other blood vessel is going to give out, and his lungs are not going to get any better" (EX 1).

Employer/Carrier argues that Claimant suffers from pain in his leg and difficulty walking because of a claudication in his right iliac artery. Employer/Carrier submits that the opinion of the physician who is treating him for this condition, Dr. Nagamia, holds the most weight with regard to whether Claimant needs a wheelchair. In Dr. Nagamia's opinion, Claimant would probably not need a scooter if he cleared the blockage from his artery. (Nagamia, pp. 60-61).

I find that this is an example of the pregnant negative, in that Dr. Nagamia tacitly admits that the Claimant needs the scooter.

I note Employer/Carrier's argument that Dr. Kabaria eventually admitted that it is highly unusual for a patient without any ambulation problems sixteen months after a traumatic accident to suddenly deteriorate to the point where he requires a motorized wheelchair to get around. (Kabaria, p. 42-45)." However, I also note that the need for the scooter is based on the Claimant's physical and mental conditions, and although unusual, I note that it is consistent with the Claimant's testimony that the need for the scooter is progressive, and that ambulation became worse over time.

B. Independent Living Needs:

Some of these needs include a reacher, adaptive utensils, a jar opener, a clipboard, a raised toilet seat, etc. (CX 5). Dr. Nagamia is the only physician to specifically offer a medical opinion as to these needs. In doing so, Dr. Nagamia testified that there is no need for a raised toilet seat because "people with claudication don't have weakness in legs". (EX 2).

The Employer/Carrier presents no evidence to rebut the other items.

Because it is the claimant's burden to establish the necessity of treatment rendered for his work-related injury, *see generally* ***Schoen v. U.S. Chamber of Commerce,*** 30 BRBS 112 (1996); ***Wheeler v. Interocean Stevedoring, Inc.,*** 21 BRBS 33 (1988); ***Ballesteros v. Williamette Western Corp.,*** 20 BRBS 184 (1988), I find that the toilet seat is not necessary.

However, I accept that the other independent living needs are reasonable, necessary and given the position on aggravation of the vascular condition, causally related to Claimant's work injuries.

C. Inpatient Facility:

Ms. Rothman recommends that the Claimant should have a short stay of inpatient rehabilitation evaluation to determine his present and future functional needs and prepare a program that would maintain his strength and keep him strong and independent as possible (CX 5).

Claimant fails to offer a medical opinion that specifically cites these facilities as necessary. Because it is the claimant's burden to establish the necessity of treatment rendered for his work-related injury, *see generally* ***Schoen v. U.S. Chamber of Commerce,*** *supra*; ***Wheeler v. Interocean Stevedoring, Inc.,*** *supra*; ***Ballesteros v. Williamette Western Corp.,*** *supra*, I find that the requested facility costs are not reasonable, necessary nor causally related to Claimant's work injuries.

Alternatively, Dr. Martinez testified that the recommended short stay inpatient rehabilitation evaluation is not medically necessary (CX 3). Dr. Martinez is a treating physician and I attribute significant weight to his opinion. I credit this testimony.

I find that referral to an inpatient facility is not medically necessary.

D. Future Medical Care:

The Rothman Report requests a neuropsychological evaluation to determine Claimant's present status and losses (CX 5). This recommendation was made on October 5, 2001. *Id*. Thereafter, the Claimant underwent a neuropsychological evaluation with Dr. Saunders, dated

May 9, 2002. Furthermore, a court order has limited the length of any neuropsychological evaluation to no longer than an hour (EX 11).

Taking this, coupled with the Claimant's inability to offer proof as to the necessity of a further neuropsychological evaluation, I find such recommendation unreasonable and unnecessary.

Moreover, I note that the Claimant did not list this issue in his Petition for Review and that his brief states that it would only address issues that were on appeal. *Id*. at 7.

E. Home Attendant Care:

According to the Rothman Report, the Claimant needs assistance with his daily care, meal preparation and grooming; therefore, it would be helpful for the Claimant to have a home health aide for two (2) hours daily to help out with the above (CX 5).

Apparently, this opinion was initiated by Ms. Rothman, but was ratified by Drs. Devine and Kabaria. Claimant argues that Drs. Devine and Kabaria "adopted" the rationale expressed by Ms. Rothman.

I accept that the Claimant's treating physicians should be credited on this issue. When an injured employee seeks benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), a treating physician's opinion is entitled to "special" weight. ***Amos v. Director, Office of Workers' Compensation Programs***, supra; ***American Stevedoring Ltd. v. Marinelli***, *supra;* ***Pietrunti v. Director, Office of Workers' Compensation Programs***, *supra*.

F. Walker

Ms. Rothman recommends that Claimant would benefit from a walker for longer distances (CX 5). The Claimant does not submit more than the general opinion from Drs. DeVine and Kabaria for this proposition.

Dr. Martinez testified, on cross-examination, that a cane (which the Claimant has) is good enough; a walker is not medically necessary (CX 3). Although all are treating physicians, I accept Dr. Martinez' testimony, as he specifically addressed the issue.

G. Chair Lift

Ms. Rothman also recommended a lift chair (CX 5). According to the report, the lift chair will assist the Claimant in getting up and out of a chair, whereas the full electronic hospital bed will enable the Claimant to get out of bed without assistance. *Id*. Claimant argues that Drs. Devine and Kabaria "adopted" the rationale expressed by Ms. Rothman.

Employer has not offered probative proof to the contrary.

I find that this issue is closely aligned to the Jazzy scooter issue, and I accept that the lift chair is medically necessary.

H. Smoke alarm.

As the architectural demands were withdrawn, I assume that this demand is also withdrawn. I note that this was not specifically included in Claimant's brief. Alternatively, I find that apart from the Rothman Report, I find no medical evidence to substantiate the demand. ***Schoen v. U.S. Chamber of Commerce,*** *supra*; ***Wheeler v. Interocean Stevedoring, Inc.,*** *supra*; ***Ballesteros v. Williamette Western Corp.,*** *supra*.

I Home Computer

Similarly, a home computer was included in the Rothman Report in order to allow Claimant to have some activity during the days when he is home alone (CX 5).

As the architectural demands were withdrawn, I assume that this demand is also withdrawn. I note that this was not specifically included in Claimant's brief. Alternatively, I find that apart from the Rothman Report, I find no medical evidence to substantiate the demand.

Schoen v. U.S. Chamber of Commerce, *supra*; ***Wheeler v. Interocean Stevedoring, Inc.,*** *supra*; ***Ballesteros v. Williamette Western Corp.,*** *supra*.

Alternatively, the only physician to specifically discuss the Claimant's need for a home computer was Dr. Martinez, who testified that the computer was not medically necessary (CX 3). His testimony is credited. I accept that the Dr. Martinez should be credited on this issue. When an injured employee seeks benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), a treating physician's opinion is entitled to "special" weight. ***Amos v. Director, Office of Workers' Compensation Programs***, supra; ***American Stevedoring Ltd. v. Marinelli***, *supra;* ***Pietrunti v. Director, Office of Workers' Compensation Programs***, *supra*.

J. Physiatrist.

Ms. Rothman recommends that Claimant should presently be under the routine care of a physiatrist to assess his functional status and medication levels and prescribe for his future needs. Drs. DeVine, Kabaria and Eichberg testified that the Claimant needs one to coordinate medical care. It is also assumed that the phsysiatrist would perform certain occupational therapy, physical therapy, communication therapy, inpatient/outpatient evaluation for rehabilitation, nursing needs, dietary assessment, education evaluation, hearing test and speech therapy evaluations (CX 5). Claimant fails to offer a medical opinion that specifically cites these evaluations as reasonable and necessary medical benefits.

On the other hand, Dr. Martinez, when questioned about the necessity of these evaluations, testified that "I really don't think he (Claimant) needs those" (CX 3). Additionally, Dr. Martinez labeled the recommended evaluations as "nice-to-have". *Id*. I credit this testimony as it specifically addresses the medical need for the evaluations. ***Amos v. Director, Office of Workers' Compensation Programs***, supra; ***American Stevedoring Ltd. v. Marinelli***, *supra;* ***Pietrunti v. Director, Office of Workers' Compensation Programs***, *supra*.

Therefore, absent more certainty from treating sources, I find that the Claimant has not established that the need for a physiatrist and the testing is warranted.

ORDER

BASED UPON THE FOREGOING Mandate of the Benefits Review Board, Findings of Fact, Conclusions of Law and upon the entire record, I issue the following amended compensation order.

1. The Employer, **IMC Agrico MP Inc.,** and its Carrier, **Travelers Insurance Company,** shall pay all continuing appropriate, reasonable and necessary medical care and treatment resulting from Claimant's work injuries under § 7 of the Act, including
    - A. A back brace;
    - B. An abdominal binder;
    - C. Family/marital counseling;
    - D. Jazzy Scooter;
    - E. Certain independent living needs: reacher, adaptive utensils, a

jar opener, a clipboard. However, a raised toilet seat is not medically necessary;
F. Chair Lift;
G. Home attendant care two (2) days per week.

for the Claimant, Larry L. Shannon, and his wife, Lila Shannon.

2. The following are not medically necessary:
A. Referral to an inpatient facility;
B. Further neuropsychological evaluation;
C. Walker;
D. Smoke alarm;
E. Home computer;
F. Treatment by a physiatrist, occupational therapy, physical therapy, communication therapy, inpatient/outpatient evaluation for rehabilitation, nursing needs, dietary assessment, education evaluation, hearing test and speech therapy evaluations.

3. Commencing on June 5, 2001, and continuing thereafter until further ORDER of this Court, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of eight hundred seventeen and twenty five hundreds dollars ($817.25), such compensation to be computed in accordance with Section 8(a) of the Act.

4. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant for the same time periods specified above as a result of his June 5, 2001 injury.

5. The District Director shall make all calculations necessary to carry out this order.

6. Within twenty (20) days after this Decision and Order becomes final, counsel for the Claimant shall submit a fully supported application for costs and fees and to the counsel for the defendants. Within 15 days thereafter, the counsel for the defendants shall provide the Claimant's counsel with a written itemization specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, the Claimant's counsel shall verbally discuss each of the objections with the counsel for the defendants. If counsel agree on an appropriate award of fees and costs they shall file written notification within ten days and shall also provide a statement of the agreed-upon fees and costs. Alternatively, if counsel disagree on any of the proposed fees and costs, the Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of his position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by the counsel for the

Employer/Carrier. The counsel for the Employer/Carrier shall have 15 days from the date of service of such application in which to respond. No reply to that reply will be permitted unless specifically authorized in advance.

SO ORDERED.

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DANIEL F. SOLOMON
Administrative Law Judge